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No. 63

In the Supreme Court of the United States

OCTOBER TERM, 1928

RAY LYMAN WILBUR, AS SECRETARY OF THE INTERIOR, PETITIONER

v.

UNITED STATES ON RELATION OF EMIL L. KRUSHNIC

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF AND ARGUMENT OF RESPONDENT

EAMES BROS., PRINTERS, DENVER

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Since the passage of the Leasing Act of 1920, as before, the owner of a valid mining claim, who has defaulted in annual labor, has a right to resume annual labor at any time prior to the initiation of a right to the claim by another during the period of default; and such claim may be perfected under Section 37 of the Leasing Act.	

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In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 813

RAY LYMAN WILBUR, AS SECRETARY OF THE INTERIOR, PETITIONER

v.

UNITED STATES ON RELATION OF EMIL L. KRUSHNIC

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF AND ARGUMENT OF RESPONDENT

OPINIONS BELOW

The opinion of the Court of Appeals is now reported in Advance Sheet No. 5 dated April 4, 1929, of 30 Fed. 2d., beginning at page 742, under the title of U. S. ex rel. *Krushnic v. West,* Secretary of the Interior.

STATEMENT

Since the above opinion was rendered, Secretary West has been succeeded by Ray Lyman Wilbur, as Secretary of the Interior, and the latter has been substituted for Secretary West as the Petitioner herein.

The nature of the controversy is clearly outlined in the Secretary's petition, as far as it goes. But there

are certain important facts, essential to a proper understanding of the controversy, which are not clearly brought out in the petition and which will now be briefly mentioned.

The Secretary, in his final opinion, admitted that Spad No. 3, the mining claim here involved, was a valid claim existent on February 25, 1920, the date upon which the Leasing Act became effective (R. 23).

During the assessment year 1920 (ending June 30, 1921) the owners of Spad No. 3 actually expended the statutory requirement of $100.00 in labor for the benefit, as they supposed, of that claim. The work was not done within the boundaries of that claim but upon adjacent claims owned by the same persons. The Secretary held that such labor did not tend to the development of Spad No. 3, and rejected it. But afterwards, in the assessment year 1921, Respondent actually expended more than $100.00 in annual labor on the claim in question.

In the assessment year 1922 Respondent again expended more than $100.00 on Spad No. 3. He continued his expenditures on Spad No. 3 until the total was more than $500.00 and then applied for patent. Some years later, the Interior Department contested the claim on the ground, among others, that the 1920 assessment work did not benefit this particular claim.

The forfeiture, attempted to be pronounced by the Interior Department against the owners of the claim followed some years after the doing of the annual labor for 1921, the doing of the annual labor for 1922 and the application for patent.

ARGUMENT

SINCE THE PASSAGE OF THE LEASING ACT OF 1920, AS BEFORE, THE OWNER OF A VALID MINING CLAIM, WHO HAS DEFAULTED IN ANNUAL LABOR, HAS A RIGHT TO RESUME ANNUAL LABOR AT ANY TIME PRIOR TO THE INITIATION OF A RIGHT TO THE CLAIM BY ANOTHER DURING THE PERIOD OF DEFAULT; AND SUCH CLAIM MAY BE PERFECTED UNDER SECTION 37 OF THE LEASING ACT.

In reaching its judgment of January 7, 1929 (R. 52), the Court of Appeals of the District of Columbia followed clear and positive decisions of this Court. Sections 2324 and 2325 Revised Statutes have repeatedly been construed by this Court and the exception contained in Section 37 of the Leasing Act was construed by this Court in the case of *Work v. Braffet,* 276 U. S. 560 (1928). The judgment of the Court of Appeals in its entirety is clearly in strict conformity with such decisions.

In his final opinion the Secretary of the Interior admitted that the mining claim involved here was "a valid claim existent on February 25, 1920," when the Leasing Act went into effect (R. 23). As such, it was, in the language of Chief Justice Waite, in *Belk v. Meagher,* 104 U. S. 279 (283), "property in the highest sense of that term, which may be bought, sold and conveyed and will pass by descent." This Court has invariably so declared the law.

Such being the character of the mining claim here involved, it was expressly preserved with all its incidents by the exception in Section 37 of the Leasing Act. In *Work v. Braffet,* 276 U. S. 560 (1928) (566), this Court held that substantial rights are preserved by the

exception, and that the preservation of such rights was the purpose of the exception. The Court says:

> "The construction argued for would tend to defeat the purpose of the Leasing Act which was to prevent the sale of the mineral lands of the United States *where substantial rights had not been acquired in them,* and to permit their exploitation only by lessees paying royalties to the Government. The reference in Sec. 37 to valid claims 'thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery' at least suggests that they embrace only *such substantial claims as would on compliance with the provisions of the former law ripen into ownership; such claims as might be acquired under the mining laws by location, possession and development which, if continued to discovery and entry would entitle the claimant to a patent.* That such was the purpose is established by the Congressional debates. 58 Cong. Rec. pt. 5, pp. 4577-4585. 66th Cong. 1st Sess." (Italics ours.)

The claim of Respondent is a "substantial claim" as defined by this Court in the above quotation, and consequently is embraced within the exception in Section 37. It was acquired under the mining laws by location, legal possession thereof by the locators and their grantees, has been uninterruptedly maintained, and sufficient patent work thereon has been done to entitle Respondent to a patent under the provisions of Section 2325 (R. 2—Brief of Petitioner, p. 2).

Under Section 2324 Revised Statutes, as construed by this Court, the extreme penalty resulting from

failure to perform annual labor upon a mining claim within the assessment year is to subject such claim to relocation during the period in which such annual labor is in default. This section gives the owner of the mining claim the express right to resume work on his claim at any time before entry by another, and such resumption of work operates to continue the exclusive possessory rights of the original locator. In *Belk v. Meagher, supra,* this Court states the law as follows (282):

> "It seems clear to us that, if work is renewed on a claim * * * before a relocation is actually made, the rights of the original owners stand as they would if there had been no failure to comply with this condition of the Act. The argument * * * of the plaintiff in error is, that if no work is done * * * all rights under the original claim are gone, but that is not, in our opinion, the fair meaning of the language which Congress has employed to express its will. As we think, the exclusive possessory rights of the original locator and his assigns were continued * * * if, before another entered on his possession and relocated the claim, he resumed work * * *. His rights after resumption were precisely what they would have been if no default had occurred."

The rule as laid down by this Court in *Belk v. Meagher* has been followed by Federal courts and by courts of last resort in all the mining states.

In spite of this clear cut rule, the Department held in the instant case that the resumption of work by Respondent was unavailing. The reason assigned by the Department for this ruling was that the proviso to

Section 37 of the Leasing Act automatically repealed or limited the application of Section 2324 in the case of mining locations falling within the terms of that proviso. The validity of this ruling was successfully challenged by Respondent in the pending action.

Petitioner's argument is confined to his postulate that "Section 37 of the Leasing Act of 1920 operated as a withdrawal of the land when locator defaulted in making annual expenditures and cut off his right to repossess and resume assessment work under Section 2324, Revised Statutes."

This assertion is supported neither by the purpose nor the language of Section 37, by Court decisions, by the former procedure of the Interior Department, nor by any recognized rule of statutory construction. Moreover, it infers a "repossession" by the locator, which implies a precedent dispossession that is wholly imaginary.

All the authorities are against Petitioner's contention. The fundamental fallacy underlying it, is the assumption that the Leasing Act applies to the facts composing the record of this case. It does not. The exception embodied in Section 37 excludes "valid claims existent at the date of the passage" of the Act, from the operation of the Act. This is equivalent to a recital that "This act shall not apply to or affect such valid claims."

Had the latter phrase been employed, the excluded claims would have proceeded to patent and been maintained under the old mining laws precisely as provided for under the recitals of the exception as it is. And it

is the old mining law only which applies to Respondent and with which he is concerned. Under its terms failure to perform the assessment work within the statutory year does not forfeit the claim nor dispossess the owner nor affect his title unless and until adverse rights are acquired by relocation. He may resume and complete the work at any time before that contingency becomes a fact.

With that contingency the Department of the Interior has no concern. Section 55 of its regulations, announced over a half century ago, declares that the subject of annual expenditure is "solely a matter between rival or adverse claimants to the same mineral land and goes only to the right of possession the determination of which is committed exclusively to the courts."

Petitioner reaches his decision denying patent to Spad No. 3 by a unique mental process, which might be summed up as follows: because the claim excluded from the Leasing Act cannot be relocated, the old mining laws cannot function as to it; therefore, he contends, it is forfeited and the privilege of resuming work after delinquency is taken from it; and it reverts, by operation of law, back to the public domain and into the dominion of the Leasing Act.

This reasoning is founded upon an untenable premise, to-wit: that the land cannot be relocated; but if the premise were true, still the conclusion reached would not be sound because there is nothing in the Leasing Act to justify it. Take the instant case, for example. The work for 1920, though afterwards held

ineffective, was actually performed, was followed by performance of assessment work for the two succeeding years, was followed by $500 of work and finally by the patent proceedings. Only at the end of this series of events does the Department say that Spad No. 3 was forfeited a number of years before because the work was held to have been done in the wrong place. This Departmental denial of justice is a virtual repudiation of the statute, whose object was fully detailed in Congressional discussions (58 Cong. Record, Part 5, pp. 4577-4582). It ignores its own Regulation 55, and conflicts with an unbroken line of decisions by this Court, beginning with *Belk v. Meagher, supra.*, decided Dec. 4, 1881.

We are unable to perceive the application of *Union Oil Company v. Smith,* 249 U. S. 337, or of *Black v. Elkhorn Mining Company,* 163 U. S. 445 to the instant case. The first very properly declares that assessment work has nothing to do with locating or holding a claim before discovery. The second holds that dower rights do not attach to possessory rights in an unpatented mining location.

As stated by the Court of Appeals in its decision (R. 47-48) 30 Fed. (2d.) 742 (745) the case of *Hodgson v. Midwest Oil Co.,* 17 Fed. (2d.) 71, cited on page 10 of the brief of Petitioner "turned largely upon a question of pleading."

There is no question in the instant case of abandonment which was the controlling fact in the land decisions cited in Petitioner's brief.

Section 37 of the Leasing Act adds nothing to the penalty for failure to do assessment work as provided in Section 2324. The valuable right of resumption of work with the resulting preservation of his property are saved to the original locator. The only limitation on the right to resume work after the passage of the Leasing Act, as before, continues to be the initiation of a right to the claim by another during the period while the default in assessment work continues. Petitioner would add an additional limitation as set out by Petitioner on page 10 of his brief "that during the time of default the land had not been withdrawn by the United States" but such additional limitation is not to be found in Section 37 of the Leasing Act.

On page 12 of the brief of Petitioner it is stated that the practical effect of the decision of the Court of Appeals is to allow the locator to postpone indefinitely the completion of work necessary to the issuance of patent. Application for patent could be indefinitely postponed under the old mining laws—in fact many valuable mineral claims from which many hundreds of thousands of dollars worth of ore have been extracted have never been patented. The Leasing Act has not removed the necessity on the part of the owners of mining claims, covering the mineral substances embraced in the Act, of the performance of annual labor to protect their claims against attack. But such attack requires an overt act, either by a third person or by the Government, itself. The Government may "by direct proceedings, upon notice, set it aside and restore the land to the public domain." *Clipper Mining Co. v. Eli*

Mining & Land Co., 194 U. S. 220 (223); *Cameron v. United States*, 252 U. S. 450; In re *H. H. Yard*, 38 L. D. 59; In re *J. B. Nichols and Cy Smith* (on rehearing), 46 L. D. 20. Any third person who wishes to obtain a lease in accordance with the provisions of the Leasing Act to the particular ground embraced within the limits of a mining claim on which the assessment work is in default, may make application for a lease at any time while the default continues and before resumption of work upon the claim by the owner. Such application at once constitutes the initiation of an adverse claim which the Department of the Interior can pass upon. A third person may initiate rights to the ground under laws other than the mining laws, for the Leasing Act does not prohibit surface agricultural entries but provides the method for the disposition of mineral deposits only. It is thus apparent that since the passage of the Leasing Act, as before, a locator runs the risk of losing his claim while his assessment work is in default. But if he resumes work and cures his default before the initiation of any adverse claim during the continuance of the default, then he has preserved his claim in its original vigor, and he is entitled to continue to maintain his claim and to perfect the same under the prior laws. And this is the situation presented in the instant case.

Petitioner repeatedly urges that the Leasing Act is intended to provide revenue to the United States from the public lands containing mineral (Brief of Petitioner, pp. 11, 13). Whatever the intention may be as to lands which were part of the public domain at the

date of the passage of the Act, no intent is manifested therein to subject existing property rights, "to confiscation by operation of departmental law" to use the language of the Court of Appeals (R. 50), for the Act expressly provides that valid claims existent at the date of its passage may be "perfected" in compliance with the laws under which initiated.

Spad No. 3 having been located under the general mining laws before February 25, 1920, it was as completely excepted from the Leasing Act as was the homestead in the forest reserve taken out of the reserve by the President's proclamation in *Lane v. Hoglund,* 244 U. S. 174, 177, where this Court, through Mr. Justice Van Devanter, said:

> "For present purposes no importance attaches to the creation of the forest reserve after the primary and before the final entry. The entryman was free, under the terms of the President's proclamation, to proceed with the steps essential to obtain a final entry and ultimately the full title, and to such a final entry the statute—the provision in Sec. 7—has the same application as if the land were without instead of within the reserve."

It is admitted that, but for the intervention of the Leasing Act, Respondent would be entitled to a patent. The statutes under which Respondent claims are not attacked as unconstitutional. Such statutes—the old mining statutes and the exception in Section 37 of the Leasing Act as well—have been construed by this Court, and under such statutes as already construed by this Court Respondent is clearly entitled to the re-

lief granted him by the Court of Appeals of the District of Columbia and the decision of that Court, review of which is now sought, is clearly correct. Under these conditions, we respectfully submit that the petition for the writ of certiorari should be denied.

CHARLES S. THOMAS,
CHESTER I. LONG,
MALCOLM LINDSEY,
LANGDON H. LARWILL,
GEORGE K. THOMAS,
PETER Q. NYCE,
Attorneys for Respondent.

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BRIEF FOR THE RESPONDENT

OPINIONS BELOW

No opinion was written by the Supreme Court of the District of Columbia. (R. 31.)

The opinion of the Court of Appeals (R. 34) is reported in 30 F. (2d) 742.

STATEMENT

This case is before this Court upon what is practically an agreed statement of facts.

The Secretary of the Interior in his final opinion admitted that Spad No. 3, the mining claim here involved, was "a valid claim existent on February 25, 1920" when the Leasing Act went into effect. (R. 19.)

During the assessment year 1920 (ending June 30, 1921) the owners of Spad No. 3 actually expended the statutory requirement of $100 for the benefit of said claim, as they believed. The work was not done within the boundaries of the claim itself but upon adjacent claims in the same group owned by the same persons. In the assessment year 1921 Respondent, who had then acquired the interests of his co-locators, actually expended more than $100 in labor on said claim itself. In the assessment year 1922 Respondent again expended more than $100 in annual labor on the claim in question. He continued his expenditures on the claim until a total of more than $500 had been expended in labor and improvements on the claim itself, and then applied for patent and paid the government price for the land covered by the claim.

Thereafter contest proceedings were initiated and proceeded with. At the final conclusion of such proceedings the Secretary found as a fact that the annual labor performed for the benefit of Spad No. 3 claim during the assessment year 1920 did not tend to the development of the claim, and, upon such finding of fact declared, as a matter of law, that the claim became forfeited to the United States immediately upon the expiration of the assessment year 1920. The Secretary based such declaration of law upon his interpretation of Section 37 of the Leasing Act and of its effect upon the old mining laws.

This action was prosecuted in the courts below to test the correctness of the Secretary's rulings on the matters of law above set out.

SUMMARY OF ARGUMENT

Rulings by the Secretary of the Interior on matters of law are reviewable in the courts which will prevent by mandamus or injunction any denial of rights to any citizen by the Secretary because of his erroneous construction of any law, under which no discretion is vested in the Secretary.

The construction placed by the Secretary on Section 37 of the Leasing Act of February 25, 1920, is erroneous. That section does not repeal any part of Section 2324 or Section 2325 of the Revised Statutes insofar as a valid existing claim is concerned. Under Section 37 of the Leasing Act valid claims existent at the date of the passage of the act may be maintained and perfected under the prior laws. Failure to perform annual labor within the assessment year is attended with no more serious penalties since the passage of the Leasing Act than before. Such failure merely subjects the claim on which the failure has occurred to the possibility of forfeiture during the continuance of the default. The owner still has the right to resume work upon his claim at any time prior to the initiation of a right to the claim by another. When the owner has complied with the provisions of Section 2325 of the Revised Statutes he is entitled to a patent and the Secretary has no discretion to refuse it.

ARGUMENT

I

MANDAMUS IS THE PROPER REMEDY

Respondent has exhausted his possibilities of securing relief in the Department of the Interior. The Secretary has assumed to declare a forfeiture of Re-

spondent's rights and has finally refused him a patent. The Secretary has based his actions upon his construction of Section 37 of the Leasing Act and the effect which he conceives such act to have upon Sections 2324 and 2325 of the Revised Statutes. All of these statutes are positive laws. None of them vest any discretion in the Secretary as to their meaning.

Under Section 2325 the Secretary must, of course, determine whether the applicant for patent has in fact complied therewith by filing the proper application, posting and publishing notice, performing $500 worth of labor, etc. When the Secretary has found as a fact that these conditions have been performed, he must issue patent, and if he refuses, the courts by mandamus will compel him to do so. In the instant case, Respondent has complied with every requirement of Section 2325 pertaining to the issuance of patent. Nevertheless, the Secretary has refused to issue patent because, he declares that Section 37 of the Leasing Act impliedly repeals Section 2324 so far as the provision in that section for resumption of work is concerned, and impliedly amends said Section 2324 by adding thereto an *ipso facto* forfeiture upon default in annual assessment work, contrary to the express language of said Section and the settled construction thereof for over half a century.

In the succeeding pages of this brief we shall present arguments to show that the Secretary has erroneously conceived the meaning and effect of the Leasing Act. In such a situation the courts have not only the power but the imperative duty to correct the Secretary

and compel him to grant Respondent his rights under the law.

It could make no difference how free from arbitrariness or capriciousness the determination of a Secretary might be, or how many decisions or regulations of the Department of the Interior or decisions of courts he might have considered in reaching a determination, if such determination were wrong, and resulted in depriving a citizen of a vested property right.

The general principles governing the relationship of the courts to the executive departments of the Government of the United States may be stated as follows:

1. If a department is constituted a tribunal to try a question of fact its finding thereon will not be reviewed by the courts.

2. If a department is given discretion as to the meaning of a law its conclusion as to the meaning of such law will not be overridden by the courts even though the courts might have come to a different conclusion as to the meaning of the law.

3. If a law does not give a department discretion to construe it, then the courts by mandamus or injunction will prevent a wrong construction of such law by a department.

To put the matter in other words: if a law provides for a department to do a certain thing upon the happening of certain events, then when such events have happened the thing to be done by the department becomes ministerial and in such case the department is not invested with discretion and the courts will com-

pel the performance of the thing by mandamus or prohibit a wrong performance by injunction.

Roberts v. U. S., 176 U. S. 221, was a case where a writ of mandamus was sought to compel the Treasurer of the United States to pay the relator certain interest. This Court, speaking through Mr. Justice Peckham, said on page 231:

> "Unless the writ of mandamus is to become practically valueless, and is to be refused even where a public officer is commanded to do a particular act by virtue of a particular statute, this writ should be granted. Every statute to some extent requires construction by the public officer whose duties may be defined therein. Such officer must read the law, and he must therefore, in a certain sense construe it, in order to form a judgment from its language what duty he is directed by the statute to perform. But that does not necessarily and in all cases make the duty of the officer anything other than a purely ministerial one. If the law direct him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree, construction of its language by the officer. Unless this be so, the value of this writ is very greatly impaired. Every executive officer whose duty is plainly devolved upon him by statute might refuse to perform it, and when his refusal is brought before the court he might successfully plead that the performance of the duty involved the construction of a statute by him, and therefore it was not ministerial, and the court would on that account be powerless to give relief. Such a limitation of the

powers of the court, we think, would be most unfortunate, as it would relieve from judicial supervision all executive officers in the performance of their duties, whenever they should plead that the duty required of them arose upon the construction of a statute, no matter how plainly they violated their duty in refusing to perform the act required."

"In this case we think the proper construction of the statute was clear, and the duty of the Treasurer to pay the money to the relator was ministerial in its nature, and should have been performed by him upon demand."

A part of the language in the Roberts decision above quoted was quoted with approval by Mr. Justice Brewer in *Ballinger v. U. S. ex rel. Frost,* 216 U. S. 240. The Frost case was an application for a mandamus against the Secretary of the Interior compelling him to deliver a patent to a tract of Indian land. On page 250 of the opinion the following language is used, quoting from earlier decisions of this Court:

"The execution and delivery of the patent after the right to it is complete are the mere ministerial acts of the officer charged with that duty."

"Where the right to a patent has once become vested in the purchaser of public lands, it is equivalent, so far as the government is concerned, to a patent actually issued. The execution and delivery of the patent after the right to it has become complete are the mere ministerial acts of the officers charged with that duty."

"No further authority to consider the patentee's case remains in the land office. No right

to consider whether he ought in equity, or on new information, to have the title or receive the patent. There remains the duty, simply ministerial, to deliver the patent to the owner—a duty which, within all the definitions, can be enforced by the writ of mandamus."

The language of the Roberts case was again quoted with approval by Mr. Justice Van Devanter in *Lane v. Hoglund,* 244 U. S. 174. The Hoglund case was an application for a writ of mandamus against the Secretary of the Interior directing the issuance of a homestead patent. The mandamus was allowed, although the Secretary earnestly contended that he had discretion to construe the statute there in question and the trial court so held. But this Court held otherwise, saying on page 181 of its opinion:

"Looking, then, at the statute in the light of all that bears upon its purpose and meaning, we think it certainly and unmistakably lays upon the Secretary of the Interior, as the head of the Land Department, a plain duty to cause a patent to be issued to a homestead entryman whenever it appears, as concededly it did in this instance, that two years have elapsed since the issue of the receiver's receipt upon the final entry and that during that period no proceeding has been initiated or order made which calls in question the validity of the entry. In the exercise of its discretion Congress has said, in substance, by this statute that for two years after the entryman submits final proof and obtains the receiver's receipt the entry may be held open for the initiation of proceedings to test its validity, but that if none such be begun within that time it shall be passed to patent as a matter

of course. Thus in a case like this, where according to the conceded facts no proceeding was begun within the prescribed period, there is no room for the exercise of discretion or judgment, but on the contrary a plain duty to see that the entryman receives a patent."

"True this court always is reluctant to award or sustain a writ of mandamus against an executive officer, and yet cases sometimes arise when it is constrained by settled principles of law and the exigency of the particular situation to do so. * * * This, we think, is such a case."

The language of the Roberts case was again quoted with approval, this time by Chief Justice Taft, in *Work v. U. S., ex rel. McAlester-Edwards Company,* 262 U. S. 200. This was also a mandamus against the Secretary of the Interior to require him to accept purchase price and issue a land patent. The issuance of the patent was ordered by this Court.

In *Payne v. Central Pacific Railway Company,* 255 U. S. 228, injunction was brought against the Secretary of the Interior to prevent him from cancelling a railroad land selection. The decision was written by Mr. Justice Van Devanter, and, quoting from an earlier decision, this Court said on page 237:

"A person who complies with all the requisites necessary to entitle him to a patent for a particular lot or tract is to be regarded as the equitable owner thereof."

Speaking with reference to the general rule announced in the statutes that the administrative execu-

tion of all public land laws is to be under the supervision and direction of the Secretary of the Interior, this Court further said on page 236:

> "But of course it does not clothe him with any discretion to enlarge or *curtail the rights* of the grantee nor to *substitute his judgment for the will of Congress as manifested in the granting act.*" (Italics ours.)

On page 238 in granting the injunction this Court said:

> "We are asked to say that this is a suit against the United States and therefore not maintainable without its consent, but we think the suit is one to restrain the appellants from cancelling a valid indemnity selection through a mistaken conception of their authority and thereby casting a cloud on the plaintiff's title."

An exhaustive review of the authorities is contained in *West v. Standard Oil Company,* 278 U. S. 200, decided by this Court in January of the present year. In that case an injunction against the continuation of proceedings in a local land office inquiring into the mineral character of certain lands, was sought. The injunction was denied. The decision was written by Mr. Justice Brandeis. On page 218 this Court says:

> "Where, by the terms of an act, the Secretary is required, upon application of the claimant, to issue a patent, * * * Congress, by implication confers upon the Secretary the power to make all determinations of law as well as of fact which are essential to the performance of the duty specific-

ally imposed. After issue of the patent or other like instrument, his findings of fact are conclusive, in the absence of fraud or mistake, not only upon the Department, but upon the courts * * *; and, though his rulings on matters of law are reviewable in the courts, * * * they are not subject to re-examination by the Department."

In the Standard Oil case this Court on page 220 quotes with approval the language of the Payne case in the second quotation therefrom set out above to the effect that the broad power of control and supervision conferred upon the Secretary "does not clothe him with any discretion to enlarge or curtail the rights of the grantee, nor to substitute his judgment for the will of Congress as manifested in the granting act."

It is thus apparent that the Secretary has no discretion "to curtail the rights" of the Respondent nor has the Secretary any discretion "to substitute his judgment for the will of Congress as manifested in the granting act." Furthermore, whenever through a "mistaken conception of their authority" departmental officials fail to issue a patent or attempt to cancel a valid entry, the courts will award the writ of mandamus or the writ of injunction, as the case may be, depending upon whether the writ is to compel the performance of a legal act or to forbid the performance of an illegal act.

In the present case the writ of mandamus is sought to compel the issuance of a patent as in the Frost, Hoglund and McAlester cases above cited, in all three of which this Court by mandamus compelled the Secretary of the Interior to deliver land patents.

II

THE DECISION OF THE SECRETARY WAS ERRONEOUS

We shall apportion our discussion of this second proposition under the following topical headings:

(a) A valid mining claim is property;
(b) The right of resumption of work;
(c) Abandonment and forfeiture distinguished;
(d) Function of assessment work since Leasing Act.

(a) A VALID MINING CLAIM IS PROPERTY.

In his decision of February 8, 1928, the Secretary of the Interior admitted that the mining claim here involved was "a valid claim existent on February 25, 1920," the date when the Leasing Act went into effect. (R. 19). Our first consideration, therefore, must be as to the nature of a valid mining claim under the law of 1872.

In *Forbes v. Gracey,* 94 U. S. 762, this Court, speaking through Mr. Justice Miller, held that a mining claim is property, although no application for patent has been made, and that such claim can be made the subject of a lien for taxes.

On page 767 this Court said:

> "Those claims are the subject of bargain and sale, and constitute very largely the wealth of the Pacific coast states. They are property in the fullest sense of the word, and their ownership, transfer, and use are governed by a well-defined code or codes of law, and are recognized by the States and the Federal government. This claim

may be sold, transferred, mortgaged, and inherited, without infringing the title of the United States. Why may it not also be made subject to a lien for taxes, and the claim, such as it is, recognized by statute, be sold to enforce the lien? We see nothing in principle or in any interest which the United States has in the land to prevent it."

The language above quoted was adopted by this Court in the celebrated case of *Belk v. Meagher,* 104 U. S. 279. The decision was written by Chief Justice Waite and on page 283 this Court said:

"A mining claim perfected under the law is property in the highest sense of that term, which may be bought, sold and conveyed, and will pass by descent."

In *Manuel v. Wulff,* 152 U. S. 505, Chief Justice Fuller said on page 510:

"It has, therefore, been repeatedly held that mining claims are property in the fullest sense of the word, and may be sold, transferred, mortgaged, and inherited without infringing the title of the United States, and that when a location is perfected, it has the effect of a grant by the United States of the right of present and exclusive possession."

This was said as to an unpatented mining claim.

In *Elder v. Horseshoe Company,* 194 U. S. 248, in an opinion by Mr. Justice Peckham in speaking of an unpatented mining claim on page 256 it was said:

"The actual title to the fee is in the govern-

ment, but the interest of the miner may be conveyed and inherited."

In *Elder v. Wood,* 208 U. S. 226, this Court, speaking through Mr. Justice Moody, held that the interest of the locator in an unpatented mining claim was taxable in spite of the prohibition against taxing the property of the United States.

In *Bradford v. Morrison,* 212 U. S. 389, in an opinion by Mr. Justice Peckham, this Court held that the interest of the owner of an unpatented mining claim could be reached by a judgment lien. The Court reviews the decisions hereinbefore cited in this section of this brief and then says on page 395:

> "We thus find that the title of a locator to a mining claim is not only property, but it is property which, in addition to being sold, transferred and mortgaged, is also capable of being inherited, without in any manner infringing the title of the United States."

In *Yosemite National Park,* 25 L. D. 48, Mr. Justice Van Devanter, then assistant attorney general, considered the question of the situation of a mining claim included within the reservation and withdrawal from settlement of certain lands known as Yosemite National Park. By the act creating the Park it was declared (p. 49), that "all persons who shall locate or settle upon, or occupy the same or any part thereof, except as hereinafter provided, shall be considered trespassers and remove therefrom: Provided, however, that nothing in this act shall be construed as in any

wise affecting * * * any *bona fide* entry of land made within the limits above described under any law of the United States prior to the approval of this act." In the opinion it was said (p. 50):

> "As has been seen, 'any *bona fide* entry of lands' within said park, made prior to the act of October 1, 1890, was specifically excepted from the operation thereof. No mention is made therein of any existing mining claim for which entry had not been made. No specific exception was really necessary to reserve any land duly entered from the operation of the act since such land, being then already appropriated, was not subject to other disposition by Congress; and it is equally clear from the language of the supreme court in the cases cited above, that no exception was needed to reserve any mining claim duly located and held in compliance with the mining laws at the date of said act. The right to the possession and use of such a claim and ultimately to perfect title to the same in accordance with the mining laws was a property right and was just as much protected by the constitutional guaranty that private property shall not be taken for public use without just compensation as was 'any *bona fide* entry' mentioned in said proviso."

It is thus apparent that the claim here involved is not "nebulous and insubstantial" as was the claim before this Court in *Work v. Braffet,* 276 U. S. 560, 566, but in the language of Mr. Justice Stone found on page 566 of that decision is a substantial claim such "as would on compliance with the provisions of the former law ripen into ownership."

It is clearly apparent, therefore, that at the time the Leasing Act was passed the claim involved in this case was property "in the highest sense of the term." It was a type of property well known in the mining regions of the United States and often of great value, as in the Forbes case, above cited, where the Court pointed out that the property there involved was "said to be worth from fifty to a hundred millions of dollars." Such was the character of Spad No. 3 mining claim at the time of the passage of the Leasing Act.

(b) THE RIGHT OF RESUMPTION OF WORK.

The Leasing Act of February 25, 1920, provides a new method of disposition of the deposits of certain minerals, including oil shale in lands which were public lands at the date of its passage. Section 37 of the Act, moreover, expressly excepts from the operation of the Act valid claims existent at the date of the passage of the Act and thereafter maintained in compliance with the laws under which initiated "which claims may be perfected under such laws." As to such claims, therefore, the old laws remain in full force and effect. Manifestly such claims must be considered in the light of the decisions construing such former laws and declaring the policy of the same. Such policy was to promote the development of the mining resources of the United States, not for the purpose of direct revenue to the United States, but for the purpose of the indirect benefit resulting from the settlement of the country and the bringing of its undeveloped mineral resources into commercial use.

Throughout Petitioner's brief frequent reference is made to the policy and purpose of the Leasing Act, which, it is declared, is to conserve the mineral resources of the United States and to permit their development only under leases providing direct return to the United States by way of royalties. This policy of the Leasing Act is not only a departure from, but is the absolute antithesis of the policy of the old mineral laws. The two policies cannot be reconciled. In considering, therefore, the status of the mining claim in question in this case it must be determined at the outset which of these two antagonistic policies is to govern.

The question is, can the policy of the Leasing Act affect the status of the mining claim in question in this case? Our answer is that it cannot, for two equally good reasons:

First, Spad No. 3 placer claim was property in the highest sense of the term at the date of the passage of the Leasing Act and a change in governmental policy cannot destroy property;

Second, the Leasing Act by its terms does not even purport to attempt to destroy such property, for it expressly excepts just such existing mining claims.

As to such excepted claims, the laws under which they were initiated constitute the basis and the measure of their rights, privileges and burdens. Likewise, the construction given to such laws prior to the passage of the Leasing Act is controlling.

It has been repeatedly held that the Government

has no concern with the performance of the annual labor under Section 2324.

In *McEvoy v. Megginson,* 29 L. D. 164, the Acting Secretary said on page 165:

> "The doing of annual assessment work is not a condition to obtaining patent."

In *Nichols v. Priest,* 29 L. D. 401, the Secretary said on page 402:

> "The land department has nothing to do with questions as to the performance of annual expenditure upon mining claims."

In re *Wolenberg,* 29 L. D. 302, the Secretary said on page 304:

> "The annual expenditure of one hundred dollars, in labor or improvements, required by Section 2324 of the Revised Statutes, is solely a matter between rival or adverse claimants to the same mineral land, and goes only to the right of possession, the determination of which is committed to the courts and not to the land department. In this respect the requirement made by Section 2324 is essentially different from that made by Section 2325, which makes the expenditure of five hundred dollars in labor or improvements, a condition to the issuance of patent, and therefore a matter between the applicant for patent and the government, the determination of which is committed to the land department. Where the required expenditure of five hundred dollars has been made upon a mining claim, failure to perform annual assessment work will not, in itself prevent the issuance of

patent or furnish any ground of protest against the allowance of a mineral entry."

In *Nielson v. Champagne Company,* 29 L. D. 491, the Secretary said on page 493:

> "The annual expenditure upon a mining claim of one hundred dollars in labor or improvements, sometimes called assessment work, required by Section 2324 of the revised Statutes, while necessary to the continued maintenance of the possessory title *as against subsequent locators,* is not a condition to obtaining a patent. In this respect it is essentially different from the expenditure of five hundred dollars required by Section 2325, which does not affect the possessory title but is a condition to obtaining a patent, and is therefore a matter between the applicant for patent and the government (*P. Wolenberg et al.,* 29 L. D., 302). A failure to perform the annual assessment work upon a mining claim does not *ipso facto* work a forfeiture of the claim but only subjects it to relocation thereafter and before the claimant resumes work." (Italics ours.)

Section 55 of the regulations of the Department of the Interior established over fifty years ago declares that the subject of annual expenditure is "solely a matter between rival or adverse claimants to the same mineral land and goes only to the right of possession the determination of which is committed exclusively to the courts." The headnote affixed to the reprint of the mining regulations quoted on page 19 of Petitioner's brief declaring certain regulations no longer applicable to deposits of the mineral substances described

in the Leasing Act, expressly excepts valid claims "existent at the date of such repeal and thereafter duly maintained pursuant to the law under which located." This leaves such regulations in full force and effect as to the claim here involved.

From the above quoted decisions and regulations of the Land Office itself, it is manifest that under the mining laws as construed prior to the existence of the Leasing Act, the Land Department had nothing to do with questions as to the performance of annual labor upon mining claims. Moreover, the performance or non-performance of annual labor under Section 2324 Revised Statutes did not in any way affect the right of a locator to a patent under the provision of Section 2325 Revised Statutes.

Both Section 2324 and Section 2325 are part of the act of May 10, 1872, which (with amendments not pertinent to the present discussion) has existed from its date down to the present time. The provisions of the act of May 10, 1872, are, in the language of the exception in Section 37 of the Leasing Act, the "laws under which" the claim here involved was initiated and the laws under which said claim "may be perfected."

Section 1 of the act of 1872, now Section 2319 Revised Statutes (U. S. C. Title 30, Section 22), declares that all valuable mineral deposits in lands belonging to the United States are free and open to exploration and purchase and the lands in which they are found to occupation and purchase by citizens of the United States.

Section 3 of the act, now Section 2322 Revised Statutes (U. S. C. Title 30, Section 26), provides that the locator shall have the exclusive right of possession and enjoyment of all the surface included within the lines of his location so long as he complies with the laws of the United States and with state, territorial and local regulations not in conflict with the laws of the United States.

Section 5 of the act, now Section 2324 Revised Statutes (U. S. C. Title 30, Section 28), provides that the miners of each mining district may make regulations not in conflict with the laws of the United States or with the laws of the state or territory in which the district is situated, governing the location, manner of recording and amount of work necessary to hold possession of a mining claim subject to certain minimum requirements as to each of these matters. As to annual labor the section provides:

> "On each claim located after the 10th day of May, 1872, and until a patent has been issued therefor, not less than $100 worth of labor shall be performed or improvements made during each year * * * and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location."

Section 6 of the act, now Section 2325 Revised

Statutes (U. S. C. Title 30, Section 29), provides the procedure for obtaining a patent.

Section 2324 is a penal statute. It provides what must be done and the penalty for the failure to do what is provided. Such being the character of the statute it must be construed strictly and in a manner as favorable to the person whose property may be subjected to the risk of being lost thereunder as is consistent with fair principles of interpretation. It is of the particular class of penal statutes wherein the penalty is provided for an act not in itself *malum in se*. The possible loss of rights of the original locator provided in the statute is not absolute or automatic, but becomes effective only if new rights are initiated to the claim prior to the resumption of work thereon by the first locator.

It has been in the light of this well established rule of construction that Section 2324 has been construed by the courts. The penalty provided in this section for the failure on the part of the owner of a mining claim to perform his assessment work within the assessment year, has been confined strictly within the language of the statute. The rule has been firmly established that the owner of a mining claim does not lose his estate in such mining claim nor does such estate terminate upon such failure, but the only penalty resulting from such failure is the possibility that adverse rights may be initiated, provided always that such initiation take place prior to the resumption of work upon his claim by the original owner.

The question of the effect of failure to perform assessment work was presented to this Court and de-

cided in the case of *Belk v. Meagher,* 104 U. S. 279 (1881). The action was ejectment brought by Belk to recover possession of a mining claim. The facts were that the claim had been originally located in 1864, prior to the enactment of the Act of May 10, 1872, which contained the first provision in any Federal statute for annual assessment work. The claim was "valid and subsisting" on May 10, 1872. By two subsequent acts the time for making the first annual expenditure under the act was extended, as to claims located prior to the passage of the act, to *January* 1, 1875. No work was done on the claim between May 10, 1872, and *June,* 1875, and the question was thus squarely presented as to the effect of the expiration of an assessment year with no annual labor performed. The assessment work continued to be in default for an interval of five months after the expiration of the assessment year. Then, during the month of *June,* 1875, and before any relocation had been made, the original locators resumed work upon the claim. No work was afterwards done on the property by the original locators or any one claiming under them.

In December, 1876, Belk attempted to relocate the property and we shall speak of his attempted relocation as the second location.

On February 21, 1877, Meagher entered the property and made another relocation which we shall speak of as the third location.

The suit was between Belk claiming under the second location and Meagher claiming under the third location. On behalf of Meagher it was contended that

the original claim, although subject to forfeiture between January 1, 1875, and the time the work was done in June, 1875, had been re-established in its original vigor by the work done in June, 1875. Should this be correct, it is clear that the assessment work done in June, 1875, protected the claim from relocation for the rest of the year 1875 and until the end of the year 1876. It was, therefore, argued on behalf of Meagher that the attempted relocation by Belk in December, 1876, was invalid because the land was then covered by the original location made by the first locator.

On behalf of Belk the identical contention was made which Petitioner makes here: that all rights under the first location were *ipso facto* forfeited on January 1, 1875, at the expiration of the first assessment year, the assessment work being then undone. This Court, however, held that the failure of the first locators to perform assessment work in the year ending January 1, 1875, did not *ipso facto* terminate their estate; that the performance of assessment work by them in June, 1875, cured their prior default; and that, accordingly, their original location continued in full force throughout the remainder of the year 1875 and the entire year 1876.

Accordingly this Court held that when Belk attempted to make his second location in December, 1876, the premises were not open for that purpose and that his attempted location was, therefore, invalid.

The Court further held that at the time Meagher made the third location the premises were open for such location since the assessment year 1876 had ex-

pired and there had been no resumption of work upon the claim by the original locators between January 1, 1877, and the time of the Meagher location.

The issue was thus squarely presented and this Court, speaking through Chief Justice Waite, declared the law as follows (page 282, 104 U. S.):

> "For all the purposes of this case the law stands as it would have stood had the original act of 1872 provided that the first annual expenditure on claims then in existence might be made at any time before Jan. 1, 1875, and annually thereafter until a patent issued. If it was not made by that time the claim would be open to relocation, provided work was not resumed upon it by the original locators or those claiming under them, before a new location was made. Such being the law, it seems to us clear that if work is renewed on a claim after it has once been open to relocation, but before a relocation is actually made, the rights of the original owners stand as they would if there had been no failure to comply with this condition of the act. The argument on the part of the plaintiff in error is that, if no work is done before January, 1875, all rights under the original claim are gone; but that is not, in our opinion, the fair meaning of the language which Congress has employed to express its will. As we think, *the exclusive possessory rights of the original locator* and his assigns *were continued without any work at all, until Jan.* 1, 1875, *and afterwards if, before another entered on his possession and relocated the claim, he resumed work to the extent required by the law.* His rights after resumption were precisely what they would have been if no default had occurred." (Italics ours.)

In *North Noonday Mining Company v. Orient Mining Company,* 1 Fed. 522 (536) (C. C. Calif. 1880), Federal Judge Sawyer had so construed the act before the decision of this Court in *Belk v. Meagher* in the following language:

> "The statute requires $100 in value of work to be done on each claim located after May 10, 1872, in each year, in order to hold it; and, in default of such work being done, authorizes the claim to be relocated by other parties, provided the first locator has not resumed work upon it. But if the first locator resumes work at any time after the expiration of the year, before other rights attach in favor of relocators, he preserves his claim."
>
> "The statute nowhere authorizes a person to trespass upon or to relocate a claim, before properly located by another, however derelict in performing the required work the first locator may have been, provided he has returned and resumed work, and is actually engaged in developing his claim at the time the second locator enters and attempts to secure the claim."

In *Bingham Amalgamated Copper Co. v. Ute Copper Co.* 181 Fed, 748 (750) (C. C. D. Utah 1910), the rule is again stated:

> "The contention is also made that, because the plaintiff failed to affirmatively show the performance of assessment work for its claim for the year 1908, it must be denied relief. A failure to perform the required annual labor does not in and of itself work a forfeiture. It only permits a relocation. As the Abraham claim was located February 25, 1906, it cannot be considered a relocation

of the plaintiff's claims based on the failure to perform the annual labor for 1908."

The language of this Court in *Belk v. Meagher,* quoted above, was quoted and followed by the Supreme Court of New Mexico in *Lacey v. Woodward* (1891), 5 N. Mex. 583. The doctrine laid down in *Belk v. Meagher* has been followed by the Supreme Courts of all mining states.

In *Emerson v. McWhirter* (1901), 133 Cal. 510, 515, the Supreme Court of California said:

> "We think these facts show resumption of work, within the meaning of the statute, and prevented forfeiture. Where a valid location of a mining claim has been made, and work done thereon in good faith, possession maintained, *and no evidence appears from which an intention to abandon may be inferred,* the courts should construe the law liberally, to prevent forfeiture. Indeed, this is the rule generally as to forfeitures. The courts are reluctant to enforce a forfeiture deeming this class of penalties odious in law; * * *." (Italics ours.)

The above case was quoted and followed in *Madison v. Octave Oil Co.* (1908), 154 Cal. 768, 773, where the court said, after quoting Section 2324 of the Revised Statutes:

> "It is not provided that a mere failure to comply with the statutory requirement shall terminate the locator's right."

In *Field v. Tanner* (1904), 32 Colo. 278, 285, the Supreme Court of Colorado said:

> "It will be observed that failure to do the annual assessment work does not *ipso facto* work a forfeiture of a lode mining claim, but the same merely becomes liable to forfeiture, which may be complete and final *when the rights of third persons accrue.* If, however, before such rights do attach, the original locator resumes work, the forfeiture is avoided. McGinnis et al. v. Egbert, 8 Colo. 41, 5 Pac. 652. Belk v. Meagher, 104 U. S. 279. (Italics ours.)

In *Knutson v. Fredlund* (1910), 56 Wash. 634, 639, the court, quoting and following 2 Lindley on Mines (2d Ed.), Sec. 651, states:

> "Resumption of work at any time prior to the lawful inception of an intervening right prevents forfeiture. *It does not restore a lost estate.*" (Italics ours.)

In *Florence-Rae Copper Co. v. Kimbel* (1915), 85 Wash. 162, 173, the Supreme Court of Washington said, after quoting R. S. Sec. 2324:

> "A forfeiture does not ensue from the mere failure to comply with the law. It requires the intervention of a third party and a relocation of the ground before any forfeiture can arise. * * * Lindley, Mines (2d Ed.), Sec. 651. Resumption of work at any time prior to the lawful inception of an intervening right prevents forfeiture, Belk v. Meagher, 104 U. S. 279."

Of course, as might be anticipated in a subject which has so often received the attention of the courts, there are some cases in which inapt expressions have

been used. The language in the case of *Hodgson v. Midwest Oil Company,* 17 Fed. (2d.) 71, quoted on page 20 of Petitioner's brief, taken by itself would seem to run counter to all of the decisions cited above in this brief, but an examination of the facts in the Hodgson case shows that such case was ejectment by a prior locator against persons who had come into possession of the property and were maintaining possession. The case being ejectment where the plaintiff must rely on the strength of his own title, the court sustained the demurrer because of the failure of the plaintiff to allege his continued assessment work up to the time of the bringing of the suit, the suit having been brought in 1925, the last assessment work having been done in 1920, and no adequate legal excuse for failure to do the assessment work being set out. The quotation in Petitioner's brief shows that the case was decided on the technical rules in regard to ejectment:

> "Now, it seems to us clear that, if an adequate legal excuse for not doing the assessment work or making the improvements is not stated in the petition, then the plaintiff has failed to state a cause of action in ejectment * * *. The plaintiff, therefore, fails to plead the requisite title in himself to show right of recovery."

On page 37 of Petitioner's brief there is a second quotation of a statement of mining law from the Hodgson case which even Petitioner concedes is incorrect.

Petitioner also cites or quotes from *Black v. Elkhorn Mining Company,* 163 U. S. 445; *Farrell v. Lockhart,* 210 U. S. 142; *Union Oil Company v. Smith,* 249

U. S. 337; *Cole v. Ralph,* 252 U. S. 286; *Gwillim v. Donnellan,* 115 U. S. 45; *Swanson v. Sears,* 224 U. S. 180; *Little Sunnell Co. v. Kimber,* 15 Fed. Cases, No. 8402; *Swanson v. Kettler,* 17 Ida. 321; *Honaker v. Martin,* 11 Mont. 91.

An examination of these cases shows that in none of them was there before the court, as in the case of *Belk v. Meagher, supra,* the question as to the rights of a locator after default in assessment work.

In the Black case the sole question decided was that a locator of an unpatented mining claim has not such an interest in the property as will sustain a claim for dower therein, against the grantee of the husband.

In the Farrell case the question was abandonment of a claim prior to the expiration of the statutory period for performing annual labor, the annual labor having been done in that period.

In the Union Oil Company case the question before the Court was the effect of assessment work prior to discovery.

The Cole case turned on the absence of discovery.

The Gwillim case determined that no third person could have the benefit of the locator's discovery for the purposes of location adverse to the first locator except such third person be a relocator after the first locator had lost or abandoned his rights.

The case of *Swanson v. Sears* in which this Court affirmed the decision in *Swanson v. Kettler* in the Supreme Court of Idaho, involved the question of abandonment by a senior locator before the expiration of a

statutory period for performing labor so as to permit a relocation by a third person; the holding being that any attempt to initiate rights by a third person in a valid and subsisting mining claim is absolutely void.

The Little Gunnell case turned on the necessity of a relocator doing everything required by statute such as posting notice, fixing boundaries, and sinking shaft, before resumption of work by the original owner.

The Honaker case decided that the attempted resumption of work there before the court was not in good faith.

The act of July 2, 1898, c. 563, 30 Stat. 651, cited on page 27 of Petitioner's brief, postponed the doing of assessment work by soldiers in the Spanish-American war. The language of Section 1 of this act is not that the claims therein mentioned are "forfeited" for nonperformance of annual assessments, but simply "subject to forfeiture."

It is manifest that the expressions in the above decisions, quoted by Petitioner, were used incidentally. In none of these cases is there the slightest intimation of any intention to contradict or modify the rule as to the effect of failure in assessment work as declared in *Belk v. Meagher.*

Petitioner also lays great stress upon three decisions of the Department, *E. C. Kinney,* 44 L. D. 580; *Interstate Oil Corporation and Frank O. Chittenden,* 50 L. D. 262, and *Cronberg v. Hazlett,* 51 L. D. 101. E. C. Kinney, decided in 1916, concerned a mining claim as to which claimant was in default in the performance

of annual assessment work at the date of a withdrawal for the construction of irrigation works under the reclamation act and it was held that the claim, being in default at such date, was not excepted from the force and effect of the withdrawal. The Interstate and the Cronberg cases differ from the Spad case in the following particulars:

1. In the Interstate and Cronberg cases there had been no resumption of work by the locator, while in the Spad case there is no question as to the performance of the 1921 assessment work on the claim itself.

2. In the Interstate case abandonment was found, and in the Cronberg case lack of discovery; neither of which elements are present in the Spad case.

3. The Interstate and Cronberg cases were cases between rival claimants, to-wit: locators claiming under the general mining laws and lessees or permittees claiming under the Leasing Act; while in the Spad case the rights of third persons are in no wise involved, so the right to resume work is entirely clear.

4. By construing the Interstate and Cronberg decisions in the light of the facts in those cases those decisions are seen to harmonize with the earlier decisions on assessment work; but if those two decisions are to be taken as precedents for the rejection of the Spad claim, then they are hopelessly out of line with the earlier rulings on the subject.

It is clear that none of said three departmental decisions approach the instant case.

On page 21 of Petitioner's brief there is quoted

from the brief of this Respondent in the court below, the statement there made that the mere nonperformance of assessment work within the assessment year does not in and of itself have any effect whatsoever upon the mining claim on which such default in annual labor is made, but, on the contrary, such mining claim continues in all its original vigor up to the instant of relocation by a third party. We base this statement upon the case of *Belk v. Meagher,* and the other cases from which we have quoted heretofore in this brief. No other reasonable conclusion can be drawn from the language of Chief Justice Waite quoted from *Belk v. Meagher* (page 282):

> "As we think, the *exclusive possessory rights* of the original locator and his assigns *were continued,* without any work at all, *until Jan.* 1, 1875, *and afterwards* if, before another entered on his possession and relocated the claim, he resumed work to the extent required by the law." (Italics ours.)

The Petitioner's first contention is for an *ipso facto* forfeiture of a mining claim in default in annual assessment work at the end of an assessment period. This contention, as we have now demonstrated, is contrary to the settled construction of Section 2324 of the Revised Statutes for over half a century.

Petitioner's second contention is that the provision in Section 2324 for resumption of work by an owner upon his claim after default, with the resulting removal of the possibility of the loss of said claim by the acquisition of rights therein by third persons during

the period of default, was impliedly repealed by Section 37 of the Leasing Act.

Such contentions are absolutely contrary to the language which Congress has employed to express its will. That language is that valid claims may be "maintained in compliance with the laws under which initiated." There is nothing in this language to show any intent on the part of Congress to repeal any portion of the old mining laws under which the claim in question was located. No additional burdens in the maintenance of his claim are placed by Section 37 of the Leasing Act upon the owner of such claim. No benefit, privilege or right which the owner of a mining claim enjoyed under the old laws is taken away by Section 37 of the Leasing Act, or even attempted to be taken away by said section.

If an attempt had been made to take away any of such rights there would be presented the fundamental question of the constitutional power of Congress to take away such rights. No such question is here presented because no such attempt has been made. The rights of an owner of a mining claim located under the old mining laws are preserved in their entirety. Congress must be held to have appreciated all of the benefits, privileges and rights which the owners of mining claims possessed under the prior laws, and to have intended the owners of mining claims located under such prior laws to continue to enjoy each thereof.

The Secretary has attempted to preserve all of the *burdens* placed upon the owner of a mining claim by Section 2324, and, at the same time, to take away from

such owner the benefit of the right of resumption conferred by said section. Such a construction of Section 37 of the Leasing Act is impossible.

There have been instances when Congress did not intend to permit the right of resumption of work; but when Congress so intended, express provision to that effect was made. An instance is the Act of March 2, 1907, c. 2559, 34 Stat. 1243, which amended the laws governing labor or improvements upon mining claims in Alaska. This last mentioned act provides for at least $100 worth of labor to be performed, or improvements to be made, on or for the benefit of every mining claim in the District of Alaska during each year, and for the filing of an affidavit showing the performance of such labor or the making of such improvements containing certain specified statements. The act then further provides:

> "And upon failure of the locator or owner of any such claim to comply with the provisions of this act, as to performance of work and improvements, such claim *shall become forfeited* and open to location by others as if no location of the same had ever been made."

This act was construed in the case of *Thatcher v. Brown*, 190 Fed. 708 (710). The court quotes the special act above quoted, and also Section 2324 of the Revised Statutes, and says:

> "It will be seen that by both the acts above quoted the annual assessment work is required to be done 'during' the year. But by the former act a failure to complete such work within the year

while rendering the ground open to relocation, was not declared to work a forfeiture of the locator's rights; on the contrary, he, together with his heirs, assigns or legal representatives, was expressly given the right to resume work upon the claim after such failure to complete it, provided no other location be made in the meantime. By its act of March 2, 1907, however, Congress, while conferring upon locators in Alaska a privilege not given by Section 2324 of the Revised Statutes, to-wit, a provision permitting Alaskan locators to file for record an affidavit showing the performance of the required annual assessment work, which affidavit should be prima facie evidence of such performance, expressly declared that, upon the failure of the locator or owner of any such claim in Alaska to comply with the provisions of the act as to the performance of work and improvements, 'such claim shall become forfeited and open to location by others as if no location of the same had ever been made.' "

"Both acts expressly require $100 worth of work or improvements to be done or made on or for the benefit of each claim during each year. But the consequences of a failure to complete such work or improvements within the year are differently declared, and such differences are irreconcilable. In the earlier act such failure is not declared to end the locator's rights; but he is thereby given the right to resume the work after the expiration of the year, provided there has been no other location meanwhile. By the later act no such permission is accorded, and there is therein an express declaration that such failure works a forfeiture of the claim. To that extent the prior law, so far as it affects claims in Alaska, was necessarily repealed by the latter one."

The right of resumption of work is a valuable right in the owner of a mining claim. A stranger attempting to relocate a claim must perform all of the initial requirements conditions precedent to a location, with the exception of making a new discovery. He must mark the boundaries of the claim, post and record notice. The owner in resuming work upon his claim need do none of these things. He grasps his pick from the ground where he dropped it and resumes his work at the point where he left it. The effect of such resumption of work is to continue the estate of the owner in all its original vigor.

This right of resumption of work given to the owner of a mining claim by Section 2324 was neither expressly nor impliedly attempted to be taken away from such owner by the Leasing Act. On the contrary, the provision of Section 37 of the act that valid claims "thereafter maintained in compliance with the laws under which initiated" may be perfected, preserves to the owners of such claims every right theretofore enjoyed under Section 2324 of the Revised Statutes, one of the most important of which, as the language in *Thatcher v. Brown, supra,* points out, is the right to resume work after default in assessment labor. Such resumption of work removes the possibility of forfeiture, and in the language of *Knutson v. Fredlund, supra,* "it does not restore a lost estate."

Petitioner urges the inapplicability to the instant case of the decisions in *Belk v. Meagher,* and the other cases following that decision from which we have quoted in earlier portions of this brief, on the ground that

all of those cases dealt with rights between rival locators and not with rights between a locator and the Government. The Secretary concedes that, prior to the passage of the Leasing Act, the Government had no concern with the performance or the nonperformance of annual labor. But he contends that the Leasing Act has invested the Government with the character of a rival locator, and that immediately upon the expiration of an assessment year, with annual labor in default, the land covered by the claim on which such default has occurred becomes a part of the public domain, without any act on the part of the Government.

Manifestly no support for these contentions can be found in the language of the exception in Section 37 of the Leasing Act. Such contentions are, therefore, attempted to be justified on the supposed policy and purpose of the Leasing Act.

As we have heretofore pointed out, however, the policy or purpose of the Leasing Act cannot in any wise affect claims excepted from its operation. Such claims must be scrutinized in the light of the policy and purpose of the old mining laws under which such claims were initiated. And such policy and purpose of the old mining laws were to encourage the development of the mineral resources of the country by extending privileges to the persons who undertook such development. Admittedly, under such prior laws, the Government had no interest in annual labor.

On page 23 of Petitioner's brief the following language is quoted from *Belk v. Meagher, supra* (page 284):

"On the 19th of December the right to the possession of this property was just as much withdrawn from the public domain as the fee is by a valid grant from the United States under the authority of law, or the possession by a valid and subsisting homestead or pre-emption entry."

Petitioner states that this language was spoken as to the character of a locator's rights *prior* to the occurrence of a default. This is an error. The claim involved in the case of *Belk v. Meagher* became in default on January 1, 1875, and continued in default until the resumption of work thereon by the original locators in June, 1875. The 19th of December mentioned in the above quotation is December 19, 1876, the date of Belk's attempted location. The above quoted language from the decision shows that the property embraced in a mining claim is just as much withdrawn from the public domain after default and resumption of work as is the fee by a valid grant from the United States. There is nothing in the Leasing Act to change this fixed construction of the effect of default and resumption of work under the prior laws so far as claims located under the prior laws are concerned.

Under the old mining laws a mining claim does not terminate *ipso facto* upon the expiration of an assessment year with annual labor in default. Resumption of work by the locator upon his claim before the initiation of any rights therein during the period of default preserves the locator's rights in their full vigor both as against the Government and as against any third

person. The passage of the Leasing Act has not changed this condition.

(c) ABANDONMENT AND FORFEITURE DISTINGUISHED.

In many of the cases cited in the brief of Petitioner the courts have failed to distinguish between forfeiture and abandonment. Many of such cases were decided on the assumption that an abandonment had taken place. This failure to distinguish between forfeiture and abandonment has necessarily led to a confusion of ideas.

> "Abandonment operates *instanter*. Where a miner gives up his claim and goes away from it without any intention of returning, and regardless of what may become of it, or who may appropriate it, an abandonment takes place, and the property reverts to its original *status* as part of the unoccupied public domain. It is then *publici juris* and open to location by the first comer. Forfeiture does not occur until some one else enters with intent to relocate the property. Abandonment may occur at any time, even after full compliance with the law as to performance of annual labor. Forfeiture will only ensue upon the lapse of the statutory period, upon failure to represent the claim, *and* upon entry and location by another." Lindley on Mines, 3d Ed., Vol. 2, Section 643, pages 1597-1598, and cases there cited. (Italics ours.)

In abandoning his claim the owner abandons all of his interest in such claim and all of the rights possessed by him as such owner. He abandons the right to resume work on his claim. Immediately upon aban-

donment the land covered by the claim becomes a part of the public domain.

But no claim is abandoned when the owner simply allows his assessment work to become in default, without any intention of abandoning his claim, but with the intention of exercising his right to resume assessment work on such claim at a later date. Assessment work may be in default, yet if the owner has no intention of abandoning his claim, such claim does not become public domain or *publici juris,* but the owner's estate in his claim continues, subject to be divested, but only and strictly within the provisions of Section 2324 of the Revised Statutes. Such a divesting of the owner of his estate would be a forfeiture.

The distinction between abandonment and forfeiture is clearly stated in the case of *Justice Mining Company v. Barclay,* 82 Fed. 554, 559, where Judge Hawley held that although the owner of a mining claim had failed to do his assessment work within the prescribed time, so that the claim was subject to relocation, yet if before any such relocation by another he resumed work, any attempted subsequent locations were invalid. Judge Hawley says:

> "It is a well-settled principle of law that abandonment of property is always a question of intention. It is a voluntary act. The property in question was never abandoned by complainant. It always asserted a claim to the ground. There is no evidence in the record which indicates any intention on its part to give up its right to this particular ground. Forfeiture may occur by failure to comply with some positive requirement of the

> statute, or of the mining rules or regulations, if the statute or rules provide that such failure shall work a forfeiture of the claim. Forfeitures, however, are not, as a general rule, favored by law. A forfeiture of a mining claim cannot be established except upon clear and convincing proof of the failure of the owners of the claim to have the work done or improvements made to the amount required by law. *Hammer v. Milling Co.,* 130 U. S. 291, 301, 9 Sup. Ct. 548."

The facts in the case at bar completely negative any abandonment of Spad No. 3 claim. Work was done in the fall of 1920 upon Spad claims 4, 5 and 6. The value of this work was in excess of $600.00. Affidavits of annual labor embracing all of the claims in the group were filed in the late fall of 1920 in accordance with the provisions of the Colorado statute upon the subject. If there had been any intention to abandon Spad claims 1, 2 and 3, on which no assessment work was done for the assessment year 1920, the locators would not have put upwards of $650.00 worth of assessment work on Spad claims 4, 5 and 6 when assessment work to the amount of $100 for each of those claims or $300 worth of assessment work would have been sufficient to hold those particular claims; or have filed the affidavits of labor as to claims 1, 2 and 3, under the provisions of the Colorado statutes. The fact that the complete assessment work was done on each of the claims in each succeeding year negatives any intention at any time to abandon any one of the six claims in the group. The claim here in question was never abandoned.

(d) FUNCTION OF ASSESSMENT WORK SINCE LEASING ACT.

It is urged in the brief of Petitioner that, with the danger of relocation removed, the owner of an oil shale placer claim existent at the date of the passage of the Leasing Act need never do any more assessment work upon such claim but may hold the claim indefinitely unless it terminated *ipso facto* on his default.

Even if the result suggested did follow from a proper construction of the Leasing Act and the mining laws, we submit that such result could not be avoided by destroying vested rights in violation of the provisions of the Constitution of the United States.

But the Leasing Act has not so removed the necessity of assessment work on the part of the owners of mining claims, covering the mineral substances embraced in the act. If assessment work is not done within the assessment year, then, at any time while such work continues to be in default and before resumption of work by the owner, various proceedings may be begun having for their object the termination of the estate of the owner in such claim, as follows:

First, any third person who wishes to obtain a lease in accordance with the provisions of the Leasing Act to the particular ground embraced within the limits of a mining claim, the assessment work upon which is in default, may, at any time while such default continues and before the resumption of work upon his claim by the owner, make application for a lease. Such application at once raises the question as to the validity of the claim. In such a proceeding the Department of

the Interior has full power, if the facts so warrant, to declare the termination of the mining claim and issue the lease.

Again, any citizen may locate the ground covered by the claim for gold, silver, cinnabar, or other mineral substances not covered by the Leasing Act. The question of the validity of the existing oil shale location would at once be presented for determination.

Again, the questin may likewise be raised by and determined at the instance of a third person who has initiated rights under laws other than the mining laws to the ground embraced in the mining claim. This is true because Section 37 of the Leasing Act provides the exclusive method of disposition only of the mineral deposits therein named, and does not prohibit surface agricultural entries.

It is thus apparent that the assumed condition wherein an owner can hold a mining claim indefinitely, without doing assessment work, is not created by the Leasing Act. The owner of a mining claim may have and enjoy every right and privilege which he had and enjoyed under the mining laws in compliance with which he initiated his claim, but if he fails to do his annual assessment work he is still liable to lose his claim as the result of proceedings begun during the period within which his default continues. The Leasing Act takes away none of the rights of locators of claims for minerals other than those described in the Leasing Act, nor the rights of surface entrymen; and it adds another class of possible adverse claimants, to-wit: applicants for leases on the minerals covered by the Act.

No steps were taken by the Government or by any third person in the interval, between the expiration of the 1920 assessment year and the resumption of work on the claim itself in the year 1921, to have a forfeiture of the claim declared on the ground of the alleged insufficiency of the 1920 assessment work. Therefore, the resumption of work removed the possibility of forfeiture.

When the Leasing Act went into effect on February 25, 1920, the claim in question was a valid existent claim expressly excepted from the operation of the act by the language of the act itself. Consequently, even though the act at the moment of its passage, had the effect of withdrawing from entry under the general mining laws all lands covered by claims theretofore abandoned, it had no effect whatsoever upon the claim involved in this case. The act, itself, could not be a location or a relocation of the claim to take effect in the future if the owner of the claim should fail to do his assessment work. As stated in *Belk v. Meagher,* 104 U. S. 279 (285), "A location to be effectual must be good at the time it is made."

After the passage of the Leasing Act the owner of the claim had the right to maintain his claim and to perfect it under the same conditions as before. His annual assessment work might become in default, but his estate in his claim would not be lost or terminated merely by reason thereof. He had the right to resume work and preserve his estate at any time before his claim was "relocated," that is, before the taking of

affirmative steps to initiate proceedings in which his claim might be declared forfeited.

The mere existence of the Leasing Act did not constitute the initiation of any such proceedings. After its passage, as before, affirmative steps had to be taken during the continuance of the default to terminate the claim. Such steps, however, would necessarily have to be authorized and limited by the provisions of the mining laws under which the claim had been initiated and was being maintained. Under such laws, in the absence of a relocation or its equivalent, the owner's estate in a mining claim continued even after default in annual assessment work, and the owner could completely prevent any forfeiture, based on such default, by resuming work on his claim before affirmative steps taken. The Leasing Act no more constituted such an affirmative step than would the resolution in the mind of a third person to relocate a claim in default not followed up by a single overt act. A person might know of mining claims in a mining district which were in default in the matter of annual assessment work. He might have walked over such claims at some prior date and have seen the mineral thereon. He might declare that he made up his mind to relocate all of the claims in the district so in default, but such general declaration would avail him nothing if not followed up by actual entry upon particular claims and the posting of notice of his location on such particular claims during the continuance of the default. (*Deeney v. Milling Co.*, 11 N. M. 279.)

In the case at bar the owner resumed work upon

his claim in 1921, without any overt act, to have the claim forfeited, having been done in the interval between the expiration of the 1920 assessment year and the date when such work was resumed. He thereby preserved his estate and destroyed the possibility that it might be terminated, because of alleged insufficiency in the 1920 assessment work which he had done for the benefit of the claim.

On page 39 of his brief Petitioner refers to the doctrine that an actual entry or office found is not necessary to enable the Government to take advantage of a condition broken and to resume possession of lands that have been forfeited. But in the absence of some appropriate judicial action there must be some appropriate legislative action before the forfeiture is accomplished. In *Spokane, etc., Ry. v. Wash. and Gt. Nor. Ry.*, 219 U. S. 166, 174, where the question of the forfeiture of a grant of right of way was before the Court, this Court said:

> "Reading this grant in the light of the former adjudications of this court, we think it must be held that it was the intention of Congress that the grantee should perform these conditions after acquiring title and taking possession, and therefore that the conditions were subsequent. This being true, there could be no forfeiture on the part of the United States without some appropriate judicial or legislative action, which it is not claimed was taken in this case."

What the legislative action required must be is clearly described in *St. Louis, etc., Railroad Co. v.*

McGee, 115 U. S. 469, 474, where this Court, speaking through Chief Justice Waite, said:

> "Legislation to be sufficient must manifest an intention by Congress to reassert title and to resume possession. As it is to take the place of a suit by the United States to enforce a forfeiture, and a judgment therein establishing the right, it should be direct, positive, and free from all doubt or ambiguity."

The construction of the Leasing Act contended for by the Secretary would allow the Government to play fast and loose with its citizens. An owner might do his assessment work in good faith year after year, as the owner did in the case at bar, without remonstrance by or upon the part of the Government, thus investing hundreds of dollars in assessment and patent work. When he had completed the required patent work, he would apply for patent, only to be told that, while he had in fact done the required amount of patent work, yet he had lost his claim many years before because, in a particular year, the assessment work which he did, in the opinion of the inspector reporting upon the patent application, was a few dollars less than $100 worth, or was not work of the character which the inspector would have done had he been doing it. If permitted to retake the claim, as improved by the work of the owner under such conditions, the Government would be taking property in direct violation of the provisions of the Constitution of the United States. An individual would be estopped to do this; and the Govern-

ment ought not to claim rights which would be inequitable in an individual.

The Secretary urges that to hold that the right of resumption of work was not taken away by the Leasing Act would render difficult the administration of said act. But the property of citizens cannot be confiscated in order to avoid inconveniences to the Land Department.

Since early in 1920 the Government has had many inspectors constantly in the field. Immediately upon the expiration of any assessment year, if any one of these inspectors had been of the opinion that a claim was in default in the matter of assessment work, such inspector could have filed a protest, and the Government, if entitled to a forfeiture, could have had such forfeiture declared. Having permitted the owner to resume work upon his claim, without having taken any action within the period when the alleged default existed, the Government has lost any opportunity of taking advantage of such alleged default; and the owner has preserved his claim under the provisions of the mining laws, and is entitled to the express provision of the Leasing Act that such "claims may be perfected" under the prior laws. Such a construction of the Leasing Act permits it to stand, side by side, with the general mining laws and allows full force and effect to be given to both. Any other attempted construction is unconstitutional and unwarranted.

The case before the Court falls into that class of cases where the courts must perform one of their most important functions, viz: the preservation of the rights

of the individual in times of changes in governmental policy.

The policy of the mining law of 1872 was to encourage the development of the mineral resources of the country. The policy of the Leasing Act of 1920 was to conserve the mineral resources and to provide a revenue therefrom. Such a sweeping change in the fundamental policy of the United States naturally called for careful adjustments to prevent injury being done to the individual. The records of Congress concerning the debates leading up to the adoption of the Leasing Act show that the Senators and Members of Congress from the mining states were properly solicitous in regard to the effect which the proposed change in policy would have on individual rights. After much consideration Congress devised the happy expedient of keeping alive the old mining laws as to existing claims.

The plan for keeping alive the old mining laws as to existing claims was embodied in Section 37 of the Leasing Act. The important words to be borne in mind in considering this section are "maintained" and "perfected." Obviously "maintained" refers to Section 2324 Revised Statutes concerning assessment work; and "perfected" refers to Section 2325 Revised Statutes concerning the procedure for obtaining patents. It is, therefore, these two sections that provide the chart of procedure as to the existing mining claims.

Section 2325 contains no provision as to assessment work. The provisions of Section 2324 are that assessment work shall be performed with a certain penalty for non-performance. This penalty is the chance of

the loss of the claim if rights of others intervene during the period of default. The courts, for half a century prior to the adoption of the Leasing Act, had been construing Section 2324; and Congress must have been content with such construction because Section 37 of the Leasing Act contains no words attempting to change such construction. Under such construction, the locator had the right of resumption of work and curing his default before the rights of another intervened.

All that the respondent is contending for in this case is that his rights shall be measured by Section 2324, as thus construed by the courts. The Secretary would contend that a portion of Section 2324 (the part requiring assessment work) is still in full force; and that another portion (that part permitting resumption of labor) has been repealed. His only argument in favor of his contention is the argument of policy in that he insists that otherwise a miner could hold his claim indefinitely without assessment work. Such an argument, even if sound, could not deprive a miner of his vested rights. But we have shown that this argument of policy is not even sound because there are many ways (surface homesteads, applications for oil shale leases, etc.) in which the rights of others may attach to the lands during the period of default and before resumption of work.

Respondent, therefore, comes before this Honorable Court confidently relying upon Section 2324 Revised Statutes—not upon a part of said section, but

upon the whole section, including the right of resumption of work.

CONCLUSION

The Secretary erred in matters of law. The courts have jurisdiction to compel the Secretary by mandamus to issue the patent to Respondent in this case. The judgment of the Court of Appeals should be affirmed.

CHARLES S. THOMAS,
CHESTER I. LONG,
MALCOLM LINDSEY,
LANGDON H. LARWILL,
GEORGE K. THOMAS,
PETER Q. NYCE,
Attorneys for Respondent.

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No. 63

In the Supreme Court of the United States

OCTOBER TERM, A. D. 1929

RAY LYMAN WILBUR, AS SECRETARY OF THE INTERIOR, PETITIONER

vs.

EMIL L. KRUSHNIC, RESPONDENT

ON CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

SPECIAL BRIEF FOR THE RESPONDENT

In the Supreme Court of the United States

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vs.

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ON CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENT KRUSHNIC

Other counsel for respondent have exhausted the subject, leaving me the needless task of reiteration. Hence I am reluctant to supplement their arguments by restating their contentions, perhaps less effectively.

But, inasmuch as I had some part in framing the Leasing Act of 1920 and have been fairly familiar with controversies attending its administration, I venture, at the instance of the interests which I represent, to submit a few brief supplemental observations with all possible brevity.

The case must turn upon the question whether it is governed by the provisions of the Mining Act of 1872, or those of the Leasing Act of 1920, or both of them as the Department contends. The court below very properly decided that the Mining Act of 1872, under which the respondent's claim was located and a patent applied for, is alone applicable to it. Hence the Leasing Act does not and cannot affect it. If this be true, of which I submit there is no doubt, the judgment of that Court must stand.

I

NO REPEAL OF THE OLDER STATUTE

The Leasing Act does not repeal the Mining Code of 1872 with its amendments, either directly or indirectly. It restricts its operation by withdrawing certain enumerated mineral deposits within the Public Domain from the list of those theretofore subject to discovery and location under it. These are no longer available to private acquisition but are made "subject to disposition only" as in the Leasing Act provided, "Except as to valid claims existent at date of passage of this Act and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery."

Claims embraced within this exception, of which the Krushnic location is one, were thus deliberately excluded from the Act. They remained unaffected by it. Their status was the same after as before its enactment. Hence they

must be enjoyed, developed and patented precisely as though no Leasing Act had been passed. They possess all the privileges and are subject to all the burdens pertaining to other "valid claims" containing gold, silver, copper or other metalliferous deposits. All this the Department concedes, but it contends that inasmuch as the "valid claims" excepted from the Act cannot be relocated by other citizens in the event the owner defaults in his annual assessment work, he must literally comply with that duty or lose his property by operation of law. This contention has but an implication to sustain it, and the implication has in turn no basis in logic, or in the law.

Were it necessary to do so it could be easily maintained that since the premises contained within the boundaries of these excepted claims were never covered by the Leasing Act, they are open, in case of default in assessment work, to relocation as other claims are and always have been. But it is not important here.

It suffices to assert that, assuming our contention to be sound, the Leasing Act is wholly foreign to the discussion. The application for patent was made under the older law, and could not have been made otherwise. The owner has taken every step required for securing it. His patent is then denied him, because an assumed disregard, not of another statute, but of a strained construction placed upon it by the Secretary of the Interior, has forfeited his title. And this, albeit other valid claims unrelated to

oil, gas or coal held under the same law, are exempt from such arbitrary confiscation.

If the ruling of the Honorable Secretary be sound it must follow that valid claims covered by the statutory exception become *eo ipso* forfeit to the Government upon the failure of the owner to perform all of his assessment work within the limits of any preceding year, although he may have performed it later, together with that of several succeeding years, without notice that the claim had been quietly reabsorbed into the Public Domain. This group of claims is thus made a separate class by Departmental Edict, whose owners are denied one of the most important privileges of the Act of 1872 as judicially interpreted for nearly sixty years. They are made subject to forfeiture by operation of law, without notice or inquiry; a doctrine wholly alien to our jurisprudence and repugnant alike to law and morals. In effect the Department applies the Alaska statute to the delinquent claimant instead of Sec. 2324 R. S.

FORFEITURES OBNOXIOUS TO THE MINING CODE

The Mining Code is entitled "An Act to Promote the Development of the Mining Resources of the United States." It encouraged the citizen to avail himself of the opportunity to explore the Public Domain for valuable deposits and appropriate them when found. This policy from the beginning to 1904 was the outstanding feature of all the Federal [illegible] Laws. The Leasing

Act embodies the opposite of that policy. But it makes no provision for arbitrary forfeitures.

The term has long been thoughtlessly confused with abandonment; which is an entirely different matter. Forfeitures are penalties and therefore odious. They are never presumed. They are never enforced save as a last unavoidable resort, after full hearing. *Per contra,* abandonment rests upon intention. It is the result of conduct, either positive or negative. The relocation of a delinquent claim under Sec. 2324 R. S. presumes abandonment. So also is the non-assertion of property rights for a period of time inconsistent with the right of continued ownership and possession. Neither of these conditions is akin to forfeiture. The former presumes the owner's acquiescence; the latter is the offspring of trial and decree.

DEPARTMENT NO JURISDICTION OVER ASSESSMENTS

The statutory requirement of annual expenditure on or for the benefit of unpatented claims never concerned the Interior Department. Section 55 of the General Land Office Rules, adopted in 1872 and still in operation, provides that "the annual expenditure of $100 in labor or improvements on a mining claim required by Section 2324 . . . is solely a matter between rival or adverse claimants to the same mineral land and goes only to the right of possession, the determination of which is committed exclusively to the courts."

A head note to the last print of these rules in-

forms us that because of more recent enactments, the regulation is not applicable to potash, oil, etc., "except as to valid claims existent at date of such repeal and thereafter duly maintained pursuant to the laws under which located," thus incorporating into the amended rule the statutory exception.

The Krushnic claim is thus again carved from the rule as amended, and is therefore not in the least affected by it. It serves to reemphasize the older declaration that the Department has no concern with annual assessments. It is beyond question, therefore, that the Secretary has no power to predicate a forfeiture upon a delinquent assessment, especially after the delinquency has been cured. It has not and never had any jurisdiction over the subject.

BASIS OF DEPARTMENTAL ACTION

This is the assumption that a delinquent shale oil mining claim is no longer subject to relocation. Why not? The Leasing Act does not sustain the assertion, but refutes it. Certainly that Act cannot be made to include land expressly excepted from its provisions. The Government is, of course, the dominant owner before patent; but that is true of all mining claims held in possession. They do not so revert to it. On the contrary they become "subject to relocation" by some other citizen. With all possible respect to the Interior Department, its assumption is not construction, but a perversion of the law.

It has been urged that if forfeiture does not

follow delinquency the claim owner may disregard the statutory requirement year after year with impunity. He may also decline to apply for patent for that is discretionary. This is no novelty. It has been true of all claims ever since the Mining Act was approved. But there are too many potential relocators around to make such conduct possible. In any case the situation outlined calls for legislative relief if any be needed. The Department cannot change the law to comply with its views, whether sound or otherwise.

The Annual Assessment Clause embodied in Sec. 2324 was inserted by the House Committee at the instance of Delegate Chaffee of Colorado. Its purpose was to require claim locators to show good faith by a minimum annual expenditure upon or for the improvement of every claim, inasmuch as the Bill placed no limitation upon the number which any citizen might decide to locate.

In the instant case, Krushnic actually made his expenditure for 1920, and also for the succeeding years. The Department, however, on examining his patent application, three years afterwards decided that the expenditure did not benefit the claim, hence it was never made in law. It therefore promptly kicked Krushnic into the street, and retained his property for Uncle Sam. Let us hope this is the first and will be the last instance of the sort.

LEGISLATIVE HISTORY

Section 37 of the Leasing Act was Section 36

of the Senate Bill, and was the subject of debate in that body on August 30, 1919. It began with the reading by Senator Jones of New Mexico, of many letters and telegrams from owners of oil claims in that State protesting against the bill unless the validity of their locations was affirmed and safeguarded. Senator Smoot in charge of the Bill asserted that the subject was fully covered by the proviso in Section 36, which he read into the record but which was finally amended by adding to it the words: "including discovery." He said further that the phrase: "except as to valid locations" originally used, had been changed to "valid claims" in deference to a recent decision of the U. S. Circuit Court of Appeals, and closed with the assurance that if the constituents of the Senator from New Mexico had complied with legal requirements in making their locations and continued to do so, the proviso of Section 36 afforded them ample protection.

Senator Lenroot, quoting from President Taft's withdrawal order of September 27th, 1909, that "all locations or claims existing and valid on this date may proceed to entry in the usual maner," asserted that under it *bona fide* claimants were fully protected from loss or injury and could proceed to patent as though the order had not been issued. That right, he said, had recently been judicially affirmed in the case of the United States vs. Consolidated Mutual Oil Company. He emphasized his assertion by declaring that, had the court decided otherwise,

the exception would have been meaningless, that it could not apply to a completed location, and that no patent was needed to safeguard a discoverer's vested right.

Senator Smoot then suggested the addition of the words "by discovery" at the end of the exception. Senator Jones proposed to substitute the word "including" for the word "by." This was accepted, thus closing the incident. See Congressional Record, Vol. 56, Part 5, pages 4577: 4582, inclusive. The House adopted the proviso as amended by the Senate without discussion.

Although not controlling, this debate should be persuasive. The purpose of the Senate was clear. It was concerned with the phraseology of the exception, and accepted it only after satisfying itself that the object desired had been fully attained. Having taken part in framing and passing the bill, I can confidently affirm that if the attitude of the Interior Department concerning the effect of delinquency in annual assessments had been even remotely anticipated, the exception would either have been more emphatic or the bill would have failed of passage.

SPIRIT OF THE LAW

The Mining Law of 1872 was prompted by the need for developing the Mineral Domain. The sole way to accomplish this was to reward the discoverer with the fruit of his discovery. The Government found its compensation in the resulting increase of wealth and prosperity, while

the acreage passing into private ownership became subject to local taxation. No obstacle was placed in the way of the citizen availing himself of the provisions of the law. Good faith alone was required of him, evidenced by his due observance of statutory requirements. The Government policy was one of encouragement to the individual, and it was under this act and in accord with that policy that the claim here involved was located, purchased and held.

Only by compliance with that Act can the title to such claims be perfected. They are excluded by express terms from the dominion of the Leasing Act, and in my judgment would have remained outside of it, had the proviso to Sec. 37 been omitted from it. The spirit of the Mining Act was neither destroyed nor impaired as to the valid mining claims existing under it on February 25th, 1920. It is as virile when invoked by their owners, as though they were claims containing gold or other metallic substances. Two conflicting rules applicable to claims located and held under the same law cannot coexist, merely because one yields oil and the other copper. No forfeiture under the law of their common origin can be invoked against the one which cannot under the same circumstances be invoked against the other.

HODGSON V. MIDWEST OIL CO.

This case reported in 17 Federal (new) 71, involving the question here at issue, is the only one in existence which sustains the Petitioner's

view. But it is in conflict with every known decision directly involving the subject, with the Mining Act, and with rule 55 of the General Land Office.

It arose from an application of the Oil Company for a lease upon premises covered by a placer claim of older date. The Court of Appeals held the claim to be invalid because it did not affirmatively appear from the pleadings that the owner had performed the annual assessment work within the statutory period.

In reaching its conclusion the court says: "It is clear that such original locator and his assigns *was required as a condition subsequent* to do the so-called assessment work periodically, and upon failure to do so *all possessory rights terminated.* Ordinarily and in the absence of any withdrawal the locator *would have the right to relocate,* equally only, however, to any other person qualified to locate."

Again: "It is well settled that a failure to do the work or have an adequate legal excuse *automatically terminates* the locator's right of possession." (Italics mine.)

The conclusion is postulated entirely upon these assumptions, both of which are in hopeless conflict with the settled law of the subject. Not a solitary authority, judicial or departmental, can be found to sustain it. No text writer ever announced such a doctrine. If it is the law every previous pronouncement of it was wrong. The unbroken course of the de-

cisions upon the subject have been here swept aside or disregarded, with nothing more than a casual reference to any of them.

Never before was it held that a delinquent locator can only resume work upon his claim by relocating it. Never was it held such a claim required relocation when work upon it was resumed. Such resumption "prior to the inception of an intervening right prevents forfeiture. It does not restore a lost estate." Kuntsen v. Friedland cited in principal brief.

Never before was it decided that failure to do the assessment work within the statutory period "automatically" or otherwise "terminates the locators' rights of possession." Belk v. Meagher, 104 U. S. 279, affirmed by a host of other decisions of the Supreme Court expressly affirms the contrary to be the law. And the Interior Department has for fifty-seven years officially declared the subject to be solely a matter between rival or adverse claimants to the same land.

Nor have the premises in question ever been withdrawn from exploration and purchase as the Circuit Court assumes. Sec. 37 of the Leasing Act in terms declares to the contrary. And it is obvious that Congress cannot by an act of withdrawal or otherwise destroy or impair the vested right of any citizen acquired in the Public Domain under and in compliance with the Public Laws.

I am entirely within the bounds of propriety when I affirm that so far as I am aware no mod-

ern decision has been so unmindful of prevailing and long established law, so indifferent to vested rights in the mineral domain which Congress has been at great pains to conserve, or so destructive in its results if it should be recognized, as that of Hodgson v. Oil Company.

Since my employment in the instant case I have carefully reviewed previous decisions upon the subject involved, in many of which I was counsel, and I can only account for the Hodgson opinion upon the theory that the court like the Department assumed the premises involved had been withdrawn from the operation of the Mining Act. It contains an intimation to that effect, which is, of course, unwarranted.

INTERESTS INVOLVED

Acting upon the advice of experienced counsel familiar with the laws of mining, many citizens and corporations have in good faith purchased from their locators many shale oil claims and have expended large sums in their development. The present attitude of the Interior Department could not have been foreseen. They were entirely justified in accepting the assurance of counsel that the title they acquired to these claims was sound, and protected by the letter and spirit of existing laws. Some of these purchases were made over six years ago, during which time the purchasers have been in undisputed possession. Some of their annual expenditures may, as in the case here, be hereafter declared unbeneficial to the claims,

in which event they would lose them, however much they may have subsequently expended upon them. Surely even if the Government's right to enforce forfeiture is concealed in Sec. 37 of the Leasing Act, it cannot acquiesce in prevailing conditions for years and then launch the penalty retrospectively without regard to its destructive consequences.

Such a policy is one of confiscation. It shocks our normal conceptions of justice and ignores all constitutional safeguards designed for the protection of private property.

I have neither cited or quoted extensively from precedents supporting the views here expressed. They have been supplied in abundance by my associates, not to mention the opinion of the District Court of Appeals here appealed from. My purpose has been to submit a brief and simple outline of the merits of the respondent's case as I understand them. The opinion appealed from expresses in a single sentence the respondent's point of view:

"It would require a stretch of the imagination to hold that under this existing policy it was intended by Congress that the Government through its Secretary of the Interior might assume the functions of a relocator and enforce the forfeiture of the locator and dispossess him of his claim."

Respectfully submitted,

/ C. S. THOMAS,
for Respondent.